Supreme Court, U.S.
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No. 05-81

In The
Supreme Court of the United States

SONIA LaFONTAINE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. How is error preserved under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004); and

2. What is the standard of review where error was not preserved under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004).

LIST OF PARTIES

All of the parties to the proceeding in the court whose judgment is sought to be reviewed are listed in the caption of the case appearing on the cover of this Petition.

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OPINION BELOW

The Summary Order of the United States Court of Appeals for the Second Circuit affirming the Judgment of the District Court, dated March 4, 2005, is reproduced herein in Appendix A at 1. That Summary Order was not selected for publication in the Federal Reporter. The Order of the United States Court of Appeals for the Second Circuit, dated May 3, 2005, which denied without opinion Petitioner's Petition for Rehearing with Suggestion for Rehearing *En Banc,* is reproduced herein in Appendix A at 6. That Order was not selected for publication in the Federal Reporter. This Court's Order, dated October 4, 2004, which granted Petitioner's Petition for a Writ of *Certiorari*, vacated her judgment of conviction, and remanded her case for further consideration in light of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), is reproduced herein in Appendix A at 8. That Order was not selected for publication in the Federal Reporter. The first Summary Order of the United States Court of Appeals for the Second Circuit affirming the Judgment of the District Court, dated February 12, 2004, is reproduced herein in Appendix A at 9. That Summary Order was not selected for publication in the Federal Reporter.

BASIS FOR JURISDICTION

On October 4, 2004, this Court granted Petitioner's Petition for a Writ of *Certiorari*, vacated her judgment of conviction, and remanded her case for further consideration in light of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004). The Summary Order of the Court of Appeals, affirming Petitioner's judgment of conviction was entered on March 4, 2005. Thereafter, Petitioner filed a Petition for a Rehearing *En Banc* which was denied without opinion on

May 3, 2005. There has not been an application to extend the time period in which this Petition must be filed. Petitioner seeks review of a final decision by a Federal Circuit Court of Appeals in a criminal case. Thus, jurisdiction for the Petition exists pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS CITED

Constitutional Provisions

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of accusation; to be confronted with witnesses against him; to have

compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Statutory Provisions

Rule 52 (a) and (b), Federal Rules of Criminal Procedure

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention

STATEMENT OF THE CASE

Introduction

This Court's landmark decision and opinion in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), significantly redefined Confrontation Clause jurisprudence by establishing a *per se* bar on the admission of out-of-court testimonial statements made by unavailable declarants when prior opportunity for cross-examination was absent.

However, despite the clarity of the *Crawford* mandate prospectively, it remains ambiguous how appellate courts determine whether a *Crawford* error has been preserved for review and what standard of review should be applied if it is determined that a *Crawford* error has not been preserved. Indeed, such ambiguity increases the significant likelihood of inconsistent and incongruous standards of review being applied to *Crawford* errors, and threatens to eviscerate the meaning of *Crawford* altogether.

Such was the case here, in which the Second Circuit, on remand from this Court for consideration in light of *Crawford*, wrongly determined that Petitioner had not preserved her objection to the erroneous admission of a guilty plea allocution in violation of the Sixth Amendment and *Crawford*, despite clear references by Petitioner's counsel to her objection in the record and despite concession by the government that since she had preserved her objection, "harmless error" analysis was appropriate. As a result, the Second Circuit applied "plain error" analysis and in so doing incorrectly relieved the government of its burden of to establish that the error was harmless beyond a reasonable

doubt.[1]

Moreover, in Petitioner's case, the incorrect determination regarding the preservation of her *Crawford* error is particularly troubling in light of Second Circuit's own post-*Crawford* doctrine of treating *Crawford* errors as preserved for purposes of review when there was doubt as to preservation. *See United States v. McClain*, 377 F.3d 219 (2d Cir. 2004) (Court assumed that the Confrontation Clause issue has been preserved for appellate review despite ambiguity in the record).

The Second Circuit further compounded its error by proceeding under ordinary "plain error" analysis, without any recognition of its own "modified plain error" doctrine, which it had previously applied when, as here, a supervening decision has resulted in *constitutional* error. *See United States v. Bruno*, 383 F.3d 65 (2d Cir. 2004) (noting that in the past the Circuit had applied a "modified plain error rule" in which the government bears the burden of persuasion as to whether substantial rights have been affected).

Finally, even if, *arguendo*, ordinary "plain error" analysis was appropriate here, as this Court explained in *United States v. Olano*, 507 U.S. 725 (1993), "plain error" analysis differs from "harmless error" analysis only with respect to which party bears the burden of persuasion with

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[1] The Second Circuit applies a "harmless error" analysis where error is preserved and a "plain error" analysis where it is not. However, as explained **post**, both standards of review require a determination of whether a constitutional error is harmless error beyond a reasonable doubt.